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ST. LOUIS, MO., MARCH 24, 1893.

The claim is made with great frequency that the administration of justice in this country is seriously obstructed and frequently defeated by technical proceedings and unreasonable regard for precedents. That there is considerable ground for such claim, it would be useless to deny. It is particularly true as to criminal cases, and the lynchings of which the daily press brings us notice from time to time are undoubtedly attributable, in large measure, to the feeling that there is no certainty of punishment even for the worst of offenders by ordinary legal process. To what extent the courts are responsible for this condition of things and how much of the blame belongs elsewhere it is impossible to determine, but there can be no doubt of the necessity of reform in the matter. A movement has been started in the legislature of Illinois, to devise some plan for the correction of the evil and the assurance of speedy trials. Lawyers of high standing in that State are said to advocate the abolition of all distinction between forms of action and all technical pleas that do not touch the merits of the case. A law is also recommended, prohibiting the reversal of a judgment for any error in the proceedings of the trial court where the appellate court is satisfied that there has been a fair trial in accordance with the constitution, and that substantial justice has been done. As eminent a lawyer as Ex-Senator Trumbull is reported to have declared in advocacy of the above measures "it is time that our courts should become dispensers of justice and not followers of precedents to the defeat of justice." The end sought to be attained by the movement above noted is undoubtedly a commendable one. It is impossible to study the opinions of courts and the results of lawsuits without being frequently impressed with the undue and unreasonable importance placed upon precedents which modern ideas and modern conditions should make obsolete. Of course it would be injudicious to advise the disregard of all precedent especially in matters of substantive law; but the idea that courts should be free to disregard technicality and precedent, at least as applicable to procedure, is a good one.

NOTES OF RECENT DECISIONS.

ATTORNEYS—COMPENSATION — DEFENSE OF POOR CRIMINALS. — In Presby v. Klickitat County, the Supreme Court of Washington hold that an attorney appointed by the court to defend a poor person accused of crime, as provided by Code Proc. § 1271, is not entitled to any compensation for his services, since the statute does not expressly provide therefor, and it is a part of an attorney's professional duty not to withhold his services from one who is stricken by poverty, and accused of crime. To compel an attorney to render services gratuitously in such a case does not cast a burden or levy a tax on him not borne by citizens engaged in any other profession or business, nor is it the taking of his time and labor, which is his property, without compensation, and without due process of law, in violation of the constitution. Anders, C. J., says:

The sole question to be determined on this appeal is whether the county of Klickitat is liable for the services of appellants rendered in pursuance of the appointment of the court. The constitution of the State guaranties to the accused in criminal prosecutions the right to appear and defend in person and by counsel; and in order that he may not be deprived of this right, under any circumstances, the law, in its beneficence, makes it the duty of the court, in case the accused is unable by reason of poverty to employ counsel, to assign counsel to defend him, if he so desires. Code Proc. § 1271. But the law nowhere makes any express provision for the payment of services rendered by attorneys under such circumstances. It is entirely silent upon the subject. This is admitted by the appellants, but they contend, nevertheless, that inasmuch as the services rendered by them were not voluntary, but were performed in obedience to the order of the court, which they were not at liberty to disregard, and which the court could not legally refuse to make, there is an implied obligation on the part of the county to pay what such services were reasonably worth. In other words, they claim that the act which required the court to appoint counsel to defend the prisoner in this case is itself sufficient to authorize the county to pay for the services thus rendered, without further legislation. To support their position, appellants argue that, the State having vouchsafed to every citizen accused of an offense against the law a speedy and impartial trial, the attorney who renders services in cases like this employs his time and labor for the benefit of the public,—that is, the State,—or, at least, for the benefit of one for whom the public were bound to furnish such assistance; and that it cannot therefore be presumed that it was the intention of the legislature that no compensation should be received therefor, although no provision is made by law for the payment of such claims. The further point is made in the brief of appellants that to compel attorneys at law to render services gratuitously is, in effect, to cast a burden or to levy a tax upon them not borne by citizens engaged in any other profession or business; and that it is a

taking of the time and labor—in other words, the property— of counsel without compensation, and without due process of law, all of which is in violation of the fundamental law of the State. There is some force in the argument of appellants, and they cite several authorities which sustain their views. Webb v. Baird, 6 Ind. 13; Hall v. Washington Co., 2 G. Greene, 473; Dane Co. v. Smith, 13 Wis. 654. But the reasoning in neither of the cases is entirely satisfactory or convincing to our minds. We cannot yield our assent to the doctrine that an appointment by the courts and the rendering of services in accordance therewith, raise a legal obligation, which fixes a liability upon the county to pay for the services thus rendered. Neither can we perceive any special force in the suggestion that the county where the trial is had or of which the accused may be a resident is liable because it is charged with the expense of the arrest, imprisonment, and trial of all persons accused of crime. Why is the county liable for these expenses? The answer is, simply, because the statute so provides. Upon principle it would seem that the State should pay the expense of keeping in confinement those who violate its laws before, as well as after, trial and conviction, together with the expense of the trial. The law, however, is otherwise, and the law must prevail, whether it be deemed reasonable or unreasonable. In some instances, no doubt, it is a hardship upon an attorney to be obliged to defend poor persons, without compensation, but, when called upon, it is a duty which he owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance, nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime. Cooley, Const. Lim. (4th. Ed.) p. 412. One of the duties of attorneys enjoined by law in this State is "never to neglect, from any consideration personal to himself, the cause of the defenseless or oppressed." Code Proc. § 91. An attorney is an officer of the court, and he takes his office with all its burdens, as well as all its rights and privileges; and among the burdens thus assumed is that of being obliged, when requested by the court, to conduct, without compensation, the defense of those who are destitute of means, and are accused of crime. Wayne Co. v. Waller, 90 Pa. St. 99; Vise v. Hamilton Co., 19 Ill. 78. See, also, Lamont v. Solano Co., 49 Cal. 158; Rowe v. Yuba Co., 17 Cal. 61; Bacon v. Wayne Co., 1 Mich. 461. In Rowe v. Yuba Co., *supra*, Field, C. J., said: It is a part of the general duty of counsel to render their professional services to persons accused of crime who are destitute of means, upon the appointment of the court, and for compensation they must trust to the future ability of the parties." The same doctrine was reasserted in Lamont v. Solano Co., and may be considered the established law in California. It seems clear to us that, if the legislature had intended that counsel should be paid for services rendered in cases of this character, they would have made their intention manifest by some enactment beyond that which merely prescribes the duty of the court in such cases.

THE AMENDMENT OF THE RECORDS OF CERTAIN CLASSES OF PUBLIC BODIES.

It is a matter of surprise and regret that the records of such public bodies as common councils, county, town, village, and school boards are often so imperfectly and inaccurately kept. This is due in part, no doubt, to the fact that the duty of keeping such records is imposed in many cases upon persons unfamiliar with work of that character, and to the further fact that the meetings of such bodies are held only occasionally, thus affording the recording officers but slight practice in the discharge of their official duties. In full appreciation of these facts the courts have quite uniformly adopted a more liberal rule with regard to the records of public bodies of this kind than is insisted upon in reference to judicial records. Where no fraud or willful error has intervened the courts are desirous of upholding the proceedings of such bodies, and great latitude in the amendment of their records is accordingly allowed.[1]

Such amendments may be made: 1st, by the recording officer; 2d, by the body whose proceedings are recorded; or 3d, by a court in a proceeding instituted directly for that purpose.

Amendments by Recording Officer.—During his term of office the clerk of such a body is clothed with very considerable authority and discretion concerning the records in his keeping. He may, of his own motion, at any time during his incumbency of the office, amend any record of the proceedings of the body made by him during his said term.[2] The ground of allowing such *ex parte* amendments by the recording officer is that he is sworn, has the custody of the records, is presumed to know the facts concerning the amendment made, and, if he makes a false amendment, may be punished for fraudulent conduct in office.[3] But the right to make such *ex parte* amendments is held by probably the better authority to cease with the expiration of the

[1] Welles v. Battelle, 11 Mass. 477; Ward v. Clapp, 4 Metc. 455; Boston Turnpike Co. v. Pomfret, 20 Conn. 590; Chamberlain v. Evansville, 77 Ind. 542.

[2] Welles v. Battelle, 11 Mass. 477; Ward v. Clapp, 4 Metc. 455; Halleck v. Boylston, 117 Mass. 469; Judd v. Thompson, 125 Mass. 553; Boston Turnpike Co. v. Pomfret, 20 Conn. 590; Gilbert v. New Haven, 40 Conn. 102; Samis v. King, 40 Conn. 304; Rowe v. Smith, 51 Conn. 266; Mott v. Reynolds, 27 Vt. 206; Avery v. Butters, 9 Grnlf. (Me.) 16; Chamberlain v. Dover, 13 Me. 466.

[3] Welles v. Battelle, 11 Mass. 477; Hartwell v. Littleton, 13 Pick. 229; Halleck v. Boylston, 117 Mass. 469; Judd v. Thompson, 125 Mass. 553; Boston Turnpike Co. v. Pomfret, 20 Conn. 590.

clerk's term of office;[4] though in New Hampshire and Missouri amendments are allowed by officers even after the expiration of their terms.[5] It will be noted later, however, that in New Hampshire all amendments of records of this kind are required to be made by direction of court, and, therefore, no stress is there laid on the fact as to whether or not the person making the amendment is still in office. It is also held that a recording officer who has been out of office for a period and is then re-elected, may amend the record of proceedings made by him during his former term of office.[6] But a clerk cannot amend records which were made by his predecessor in office.[7] Where the regular clerk was absent from a meeting, and the record was made by a temporary clerk, it was held that the record thus made might be amended by the regular clerk from writings in his official custody.[8]

Amendments by the Body Itself.—There is no doubt that the record of a public body may be amended by that body at any time so long as its members remain the same.[9] This applies more particularly to common councils, town boards, and other bodies of like character, whose members are fixed in number. But it has been held that the records of one such body cannot be amended by its successor, the latter being differently constituted as to its members.[10] Certain of these bodies, however, such as county commissioners, clothed by statute with functions judicial in their nature, have been held to have the same power as courts over their records, including the power to remove obvious defects therefrom, and this, too, by a body differently constituted from that under which the original record was made.[11] Any corporation may correct mis-entries which its clerk has made, or may direct him so to do.[12]

Amendments by Judicial Proceedings.—Where an officer who has the right to correct an erroneous record refuses to do so, he may be compelled by *mandamus* to make such amendment,[13] the writ in such case running against such officer alone.[14] On the other hand, a fraudulent or an erroneous amendment made by the recording officer may be corrected by *mandamus*.[15] Not only may such records be amended in judicial proceedings instituted directly for that purpose, but it has been held that amendments of them conformable to the truth may be allowed by the court, when the records are presented in evidence.[16] Amendments by leave of court should be made upon evidence submitted,[17] and the party moving for the amendment should make out the mistake beyond any reasonable doubt;[18] but it is not material, in such cases, whether the officer who made the error in the record is in or out of office at the time its correction is ordered.[19]

Manner of making Amendments.—Where a record sought to be amended is involved in pending litigation, the better opinion seems to be that the amendment should be made only in proceedings instituted in court for that purpose and upon proper notice to all parties interested.[20] The practice of amend-

[4] Hartwell v. Littleton, 13 Pick. 229; School District v. Atherton, 12 Metc. 105; Wilkie v. Hall, 15 Conn. 32; Boston Turnpike Co. v. Pomfret, 20 Conn. 590; Mott v. Reynolds, 27 Vt. 206. See, also, Perrin v. Reed, 33 Vt. 62.

[5] Gibson v. Bailey, 9 N. H. 168; Cass v. Bellows, 31 N. H. 501; Pierce v. Richardson, 37 N. H. 306; Boody v. Watson, 64 N. H. 162, 181; Kiley v. Cranor, 51 Mo. 541; Kiley v. Oppenheimer, 55 Mo. 374; Stradler v. Roth, 59 Mo. 400; Morley v. Weakley, 86 Mo. 451; Prendergast v. Richards, 2 Mo. App. 187; Eyerman Bleakesley, 13 Mo. App. 407. The cases from Missouri, however, mainly, if not entirely, relate to amendments by city surveyors, city engineers, etc.

[6] Welles v. Battelle, 11 Mass. 477; Hartwell v. Littleton, 13 Pick. 229; Mott v. Reynolds, 27 Vt. 206.

[7] Taylor v. Henry, 2 Pick. 397.

[8] Kellar v. Savage, 17 Me. 444.

[9] Foster v. Park Commissioners, 131 Mass. 225; Leominster v. Conant, 139 Mass. 384; Turley v. County of Logan, 17 Ill. 151.

[10] Pontiac v. Axford, 49 Mich. 69; Covington v. Ludlow, 1 Metc. (Ky.) 295; Foster v. Park Commissioners, 131 Mass. 225. See, Leominster v. Conant, 139 Mass. 384; Dresden v. County Commissioners, 62 Me. 365.

[11] Inhabitants of Andover v. County Commissioners, 5 Gray, 393; Grand Junction R. R. and Depot Co. v. County Commissioners, 14 Gray, 553; Stone v. Charlestown, 114 Mass. 214; Gloucester v. County Commissioners, 116 Mass. 579. See, Chamberlain v. Evansville, 77 Ind. 542.

[12] Hutchinson v. Pratt, 11 Vt. 402, 420.

[13] Manning v. Fifth Parish in Gloucester, 6 Pick. 6, 16; Mayhew v. District of Gray Head, 13 Allen, 129; Boston Turnpike Co. v. Pomfret, 20 Conn. 590; Gilbert v. New Haven, 40 Conn. 102; Samis v. King, 40 Conn. 304; Hill v. Goodwin, 56 N. H. 441. See, Smith v. Morse, 38 Conn. 105.

[14] Farrell v. King, 41 Conn. 448.

[15] Boston Turnpike Co. v. Pomfret, 20 Conn. 590.

[16] Roberts v. Holmes, 56 N. H. 560; Blake v. Oxford, 62 N. H. 299.

[17] Smith v. Messer, 17 N. H. 420.

[18] Hovey v. Wait, 17 Pick. 196.

[19] Boody v. Watson, 64 N. H. 162, 181.

[20] Wilkie v. Hall, 15 Conn. 32; Boston Turnpike Co. v. Pomfret, 20 Conn. 590 (dissenting opinion); Low v. Pettengill, 12 N. H. 337; Northwood v. Barrington, 9 N. H. 369; Marsh v. McKenzie, 99 Mass. 64; Hill v.

ing and altering records in an *ex parte* manner, after a controversy has already arisen, to meet a particular case, or in consequence of a decision of a court, has been very strongly condemned.[21] Where amendments are made by the recording officer, he should base his action in all cases upon what is equivalent to his own certain recollection,—either upon his own personal recollection or upon original documents or minutes.[22] He should not incorporate, by way of amendment, mere statements of facts or opinions not properly matters of record.[23] When amendments are made by order of court, the order should set out in terms the precise alteration to be made.[24] In such cases the record should show when, how and why the amendment was made, and all the facts connected with it essential to show its validity.[25] The amendment should not be made by interlineations or erasures in the original, but should be written on a separate paper, signed by the proper officer; and a copy of the order of court allowing the amendment should also be annexed.[26] In furnishing a copy of an amended record, a transcript of the original record as well as of the amendment, should be supplied.[27]

Conclusiveness of Records as Evidence.—The law requires that such bodies as we are considering shall keep a record of their proceedings, to the end that those who may be called upon to act under it may have no occasion to look beyond it.[28] When a document purporting to be such a record is offered in evidence, the only question for determination is whether it is a record. If it is, then it imports absolute and uncontrollable verity and is the only evidence of the facts which it states.[29] It is, however, proper to inquire into the circumstances showing whether or not the document offered in evidence is, in fact, a record at all.[30] Thus, it has been held admissible to show by parol testimony the time and place where the recorded transactions occurred, though such testimony established the fact that no legal meeting had been held and, consequently, that the record was itself a nullity.[31] But the record made by the clerk or recording officer is conclusive of the facts therein stated so long as it stands as the record.[32] This conclusiveness attaches only to such statements as are properly a matter of record, however. Mere statements of facts or opinions which are not properly matters of record, cannot be made so by amendment.[33] But even a fraudulent or erroneous amendment, when it concerns a matter proper to be recorded and when made by a person having authority, cannot be collaterally attacked by parol evidence.[34] It sometimes becomes important to determine whether writings do or do not constitute a record. It has been decided, doubtless correctly, that that which is kept by the recording officer as and for the record is the record,—not memoranda taken and kept by him merely for the purpose of aiding in making up the record.[35] But, until copied into the regular book of records or otherwise put in a permanent form, the written minutes of a meeting constitute the record of the meeting.[36] Where, however, the charter of a city required that the city clerk should keep a correct journal of the proceedings of the common council, minutes preserved by the clerk in such a manner that they were intelligible only to himself were held not to constitute a compliance with the charter provisions.[37] A record can be contradicted, varied or im-

Hoover, 5 Wis. 386. See, also, Mott v. Reynolds, 27 Vt. 206. The contrary view is taken in Durfey v. Hoag, 1 Aik. (Vt.) 286 and Avery v. Butters, 9 Grnlf. (Me.) 16. In Balch v. Shaw, 7 Cush. 282, it is held that courts may amend their records, on their own motion, or at the suggestion of a party interested, without giving notice of the proposed amendment to anyone.

[21] Hadley v. Chamberlain, 11 Vt. 618.

[22] Mott v. Reynolds, 27 Vt. 206; Boston Turnpike Co. v. Pomfret, 20 Conn. 590 (dissenting opinion); Rowe v. Smith, 51 Conn. 266.

[23] Judd v. Thomson, 125 Mass. 553.

[24] Gibson v. Bailey, 9 N. H. 168; Pierce v. Richardson, 37 N. H. 306; Boody v. Watson, 64 N. H. 162, 181.

[25] Gibson v. Bailey, 9 N. H. 168; Low v. Pettengill, 12 N. H. 337; Pierce v. Richardson, 37 N. H. 206.

[26] Gibson v. Bailey, 9 N. H. 168; Pierce v. Richardson, 37 N. H. 306.

[27] Gibson v. Bailey, 9 N. H. 168.

[28] Sawyer v. Railroad, 62 N. H. 135.

[29] Boston Turnpike Co. v. Pomfret, 20 Conn. 590; Sawyer v. Railroad, 62 N. H. 135.

[30] Wilkie v. Hall, 15 Conn. 32; Boston Turnpike Co. v. Pomfret, 20 Conn. 590; Samis v. King, 40 Conn. 298, 304; Hall v. People, 21 Mich. 456. See Low v. Pettengill, 12 N. H. 337.

[31] Chamberlain v. Dover, 13 Me. 466.

[32] Sawyer v. Railroad, 62 N. H. 135; People v. Zeyst, 23 N. Y. 140.

[33] Judd v. Thompson, 125 Mass. 553.

[34] Halleck v. Boylston, 117 Mass. 469; Judd v. Thompson, 125 Mass. 553; Samis v. King, 40 Conn. 304.

[35] Board of Education v. Moore, 17 Minn. 412.

[36] Wallace v. First Parish in Townsend, 109 Mass. 263. See, Vawter v. Franklin College, 53 Ind. 88.

[37] City of Louisville v. McKegney, 7 Bush, 651.

peached only in proceedings instituted directly for the purpose of correcting the record.[38] Parol evidence in a collateral proceeding is inadmissible to contradict, vary or impeach such a record.[39] Where proceedings of public bodies are required by law to be of record they can be proved only by the record;[40] and in general it may be said that the only evidence of the proceedings of corporate meetings is contained in their recorded votes.[41] The record is evidence of all that was done and that nothing more was done.[42] Parol proof has been held incompetent to supply a fact omitted from the record.[43] Concerning this point, however, the authorities are by no means unanimous.[44] Parol testimony to supply such omissions will be the more readily received, if the record is not made by statute the only evidence of the proceedings.[45] Facts which are not from their very nature matters of record, and which are not required by statute to be recorded, may be proved by parol in the first instance.[46] Where from lapse of time, it may be presumed that the officers who made the records are no longer living or have lost a recollection of the facts, or where the decease of such officers is in fact proved, the existence of facts omitted from the record may be presumed.[47] Where the record has been lost or destroyed parol proof is admissible to prove its contents;[48] and proceedings which have never been recorded at all may also be proved by parol.[49] Parol proof is also admissible to apply a record to its proper subject-matter,[50] or to aid in explaining a record, the import of which, owing to interlineations or erasures, cannot be clearly made out.[51]

Amendments—Vested Rights.—Though it is no objection to the amendment of a record that proceedings are pending which may be affected by it,[52] yet all such amendments are made with a saving of the vested rights which third persons have acquired since the existence of the defect in the record and in reliance upon it.[53]

THOMAS A. POLLEYS.

Madison, Wisconsin.

[38] Sawyer v. Railroad, 62 N. H. 135; Eddy v. Wilson, 43 Vt. 362

[39] Saxton v. Nimms, 14 Mass. 315; Pease v. Smith, 24 Pick. 122; School District v. Atherton, 12 Metc. 105; Mayhew v. District of Gray Head, 13 Allen, 129; Andrews v. Boylston, 110 Mass. 214; Hutchinson v. Pratt, 11 Vt. 402, 420; Mott v. Reynolds, 27 Vt. 206; Slack v. Norwick, 32 Vt. 818; Hunneman v. Fire District, 37 Vt. 40; Adams v. Crowell, 40 Vt. 31; Cameron v. School District, 42 Vt. 507; Eddy v. Wilson, 43 Vt. 362; Crommett v. Pearson, 18 Me. 344; Nobleboro v. Lincoln Commissioners, 68 Me. 548; Boston Turnpike Co. v. Pomfret, 20 Conn. 590; Sawyer v. Railroad, 62 N. H. 135; Monaghan v. School District, 38 Wis. 100; Stevenson v. Bay City, 26 Mich. 44; Town of Eldora v. Burlingame, 62 Iowa, 32; People v. Zeyst, 23 N. Y. 140; City of Troy v. Railway Co., 11 Kan. 519. See, Winchester v. Thayer, 129 Mass. 129.

[40] City of Logansport v. Crockett, 64 Ind. 319.

[41] Harris v. School District, 28 N. H. 58; Moor v. Newfield, 4 Grnlf. 44; Nobleboro v. Lincoln Commissioners, 68 Me. 548; Cabot v. Britt, 36 Vt. 349; Stevenson v. Bay City, 26 Mich. 44. See, Methodist Chapel Corporation v. Herrick, 25 Me. 354.

[42] Hutchinson v. Pratt, 11 Vt. 402, 420.

[43] Taylor v. Henry, 2 Pick. 397; Manning v. Fifth Parish in Gloucester, 6 Pick. 6; Morrison v. Lawrence, 98 Mass. 219; Andrews v. Boylston, 110 Mass. 214; Sherwin v. Bugbee, 17 Vt. 337; Mott v. Reynolds, 27 Vt. 206; Gilbert v. New Haven, 40 Conn. 102; Stevenson v. Bay City, 26 Mich. 44.

[44] Ward v. Clapp, 4 Metc. 455; School District v. Atherton, 12 Metc. 105; Keller v. Savage, 17 Me. 444; Faymouth v. Koehler, 35 Mich. 22; Gearhart v. Dixon, 1 Pa. St. 224; Darlington v. Commonwealth, 41 Pa. St. 68.

[45] Chicago, etc. Ry. Co. v. Commissioners of Stafford County, 36 Kan. 121; Indianapolis v. Imberry, 17 Ind. 179.

[46] Pease v. Smith, 24 Pick. 122.

[47] Cavis v. Robertson, 9 N. H. 524; Northwood v. Barrington, 9 N. H. 369; State v. Alstead, 18 N. H. 59.

[48] Pease v. Smith, 24 Pick. 122; Wallace v. First Parish, 109 Mass. 263; Sawyer v. Railroad, 62 N. H. 135; Slack v. Norwick, 32 Vt. 818; City of Troy v. Ry. Co., 11 Kan. 519; City of Aurora v. Fox, 78 Ind. 1; Ross v. City of Madison, 1 Ind. 281.

[49] Hutchinson v. Pratt, 11 Vt. 402, 420; Slack v. Norwick, 32 Vt. 818; Langsdale v. Bonton, 12 Ind. 467; Junction Ry. Co. v. Reeve, 15 Ind. 236; State v. Hauser, 63 Ind. 155.

[50] Baker v. Windham, 13 Me. 74.

[51] St. Louis, etc. Ry. Co. v. Tiernan, 37 Kan. 606.

[52] Bean v. Thompson, 19 N. H. 290.

[53] Gibson v. Bailey, 9 N. H. 168; Bean v. Thompson, 19 N. H. 290; Jaquith v. Putney, 48 N. H. 138; Sawyer v. Railroad, 62 N. H. 135; Emerson v. Upton, 9 Pick. 167; Marsh v. McKenzie, 99 Mass. 64; New Haven, etc. R. R. Co. v. Chatham, 42 Conn. 465; Nobleboro v. Lincoln Commissioners, 63 Me. 548; Chamberlain v Evansville, 77 Ind. 542.

LANDLORD AND TENANT—WHEN RELATION EXISTS—DANGEROUS PREMISES — INSTRUCTIONS.

DOYLE V. UNION PAC. RY. CO.

United States Supreme Court, January, 23, 1893.

1. Where a railroad company leases to an individual a house situated near its railroad track, under an agreement that the lessee shall board its section hands therein at a specified price to be paid by the hands, the company agreeing to aid her in collecting the same by retaining the amount from their wages, the relation thus created, in so far as concerns the company's duty in respect to the leased premises, is merely that of landlord and tenant.

2. Under the rule that there is no implied warranty on the part of a landlord that the demised house is safe or reasonably fit for occupation, a railroad company which lets a house situated upon a mountain side where snowslides sometimes occur is not bound to notify the lessee of the danger therefrom, although the company has knowledge thereof, and the lessee has not, and has never before lived in a region where snowslides occur; and in the absence of any deceit or misrepresentation the company is not liable for personal injuries to the lessee, or for the death of members of her family, occasioned by the destruction of the house by a snowslide.

3. It is not reversible error for a federal judge to express to the jury his opinion on the facts, if the rules of law are correctly laid down, and the jury are given to understand that they are not bound by such opinion.

Mr. Justice SHIRAS delivered the opinion of the court.

In the early part of November, A. D. 1883, Marcella Doyle, a widow with a family of six children, agreed with the Union Pacific Railway Company to occupy the company's section house situated on the line of the railroad at or near Woodstock, in the county of Chaffee and State of Colorado, and to board at said section house such section hands and other employees of the company as it should desire at the rate of $4.50 per week, to be paid by the persons so to be boarded, and the company agreed to aid her in collecting her pay for such board by retaining the same for her out of the wages of the employees so to be boarded.

Mrs. Doyle moved with her children into the section house, and continued in the discharge of her duties as boarding-house keeper until the 10th day of March, A. D. 1884, when a snowslide overwhelmed the section house, injured Mrs. Doyle, and crushed to death the six children residing with her.

Subsequently, Marcella Doyle brought, in the Circuit Court of the United States for the district of Colorado, two actions against the Union Pacific Railway Company,—one for her personal injuries; the other for damages suffered by her in the loss of her children, — and which latter action was based on a statute of the State of Colorado.

The actions resulted in verdicts and judgments in favor of the defendant company, and the cases have been brought to this court by writs of error. As the cases turn upon the same facts and principles of law, they can be disposed of together.

* * *

The first question to be determined is, what was the relation between the plaintiff and the railway company? Was Mrs. Doyle a servant or employee of the company, aiding in the transaction of its business and subject to its directions, or was she a tenant at will holding the premises by an occupation during the will of the company? The facts averred by the plaintiff show that the company was not interested, in a legal sense, in the management of the boarding house; did not receive the board money, pay the expenses, take the profits, or suffer the losses. The company could not call upon her for any account, nor could she demand payment from the company for any services rendered by her in carrying on the boarding house. The fact that the company agreed to aid her in collecting what might be due to her from time to time by the boarders, by withholding moneys out of the wages payable to them by the railroad company, did not convert Mrs. Doyle into a servant of the company, or change her relation to the company as a tenant at will of the company's house. Such arrangement might equally have been made if Mrs. Doyle had been the owner of the house. The court below was not in error in holding that the relation of the parties was that of landlord and tenant.

If, then, such was the relation of the parties, upon what principle can a liability for the damages occasioned by the snowslide be put upon the company? There was neither allegation nor proof of fraud, misrepresentation, or deceit on the part of the defendant company as to the condition of the premises. Indeed, it was not even pretended that the catastrophe was in any way occasioned by the condition of the house.

It was, indeed, alleged that the section house was built near the base of a high and steep mountain, and in a place subject to snowslides, and dangerous on that account; that the company was aware of said danger; that the plaintiff and her children had never before resided in a region of country subject to snowslides, and had no knowledge of snowslides or of their indications, or of the dangers incident thereto; and that the company did not at any time notify or apprise the plaintiff or her children of the danger of snowslides or of the liability of snowslides at such place where said section then was, or in that locality; and upon this alleged state of facts it was contended that the jury had a right to find that the railway company was guilty of carelessness or disregard of duty toward the plaintiff such as to make it liable in these actions.

It is, however, well settled that the law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes, or snowslides. The law is thus stated in a well-known work on Landlord and Tenant:

"There is no implied warranty, on the letting of a house, that it is safe, well built, or reasonably fit for habitation; or of land, that it is suitable for cultivation, or for any other purpose for which it was let; and where a person hired a house and garden for a term of years, to be used for a dwelling house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract

on a demise of real estate that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defense to an action for rent; and in all cases where a tenant has been allowed, upon suggestions of this kind, to withdraw from the tenancy, and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment as to the state of the premises which were the subject of the letting, or else the premises proved to be uninhabitable by some wrongful act or default of the landlord himself. The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation, and that the lessee does not know it, and is influenced by his belief of the soundness of the house in agreeing to take it; for the conduct of the lessor may, in this respect, amount to a deceit practiced upon the lessee." Tayl. Landl. & Ten. § 382.

The principles applicable to the present case have been well stated in the recent case of Bowe v. Hunking, 135 Mass. 380. The syllabus states the case and decision as follows:

"A tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread of which has been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord; the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it, and it bore his weight, and he thought it would bear anybody's weight."

The judge directed a verdict for defendants, and the supreme court sustained this ruling. Field, J., giving the opinion of the court, said (page 383):

"There is no implied warranty in the letting of an unfurnished house or tenement that it is reasonable fit for use [citing cases]. The tenant takes an estate in the premises hired, and persons who occupy by his permission, or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter his premises [citing cases].

"In the case at bar there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the staircase. This duty if it exists, does not arise from the contract between the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction as a ground of liability between an intentional and an unintentional neglect to perform it; but in such a case as this is there can be no such duty without knowledge of the defect. There is no evidence of any such knowledge, except on the part of C. D. Hunking, and the other defendants cannot in any event be held liable, unless his knowledge can be imputed to them, as the knowledge of their agent in letting the premises. The evidence is insufficient to warrant the jury in finding that C. D. Hunking intentionally concealed the defect from the tenant; and the action, if it can be maintained, must proceed upon the ground of neglect to perform a duty which the law imposed upon the defendants.

"A tenant is a purchaser of an estate in the land or building hired; and Keates v. Earl of Cadogan, 10 C. B. 591, states the general rule that no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit. See, also, Robbins v. Jones, 15 C. B. (N. S.) 240. This is a general rule of *caveat emptor*. In the absence of any warranty, express or implied, the buyer takes the risk of quality upon himself. Hight v. Bacon, 126 Mass. 10; Ward v. Hobbs, 3 Q. B. Div. 150; Howard v. Emerson, 110 Mass. 320. This rule does not apply to cases of fraud."

This rule of *caveat emptor* has been applied also in many other cases, some of which we now refer to.

Keates v. Earl of Cadogan, above cited, was an action on the case. The declaration stated in substance that the defendant knew that the house was in such a ruinous and dangerous state as to be dangerous to enter, occupy, or dwell in, and was likely to fall, and thereby do damage to persons and property therein; that the plaintiff was without any knowledge, notice, or information whatever that the said house was in said state or condition; that the defendant let the house to plaintiff without giving plaintiff any notice of the condition of the house; and that plaintiff entered, and his wife and goods and business were injured. Defendant demurred to the declaration, and the court unanimously sustained the demurrer. Jervis, C. J., giving the opinion, said (page 600):

"It is not contended that there was any warranty that the house was fit for immediate occupation; but it is said that, because the defendant knows it is in a ruinous state, and does nothing to inform the plaintiff of that fact, therefore the action is maintainable. It is consistent with the state of things disclosed in the declaration that, the defendant knowing the state of things, the plaintiff may have come to him and said, 'Will you lease that house to me?' and the defendant may have answered, 'Yes, I will.' It is not contended by the plaintiff that any misrepresentation was made, nor is it alleged that the plaintiff was acting on the impression produced by the conduct of the defendant as to the state of the house, or that he was not to make investigations before he began to reside in it. I think, therefore, that the defendant is entitled to our judgment, there be-

ing no obligation on the defendant to say anything about the state of the house, and no allegation of deceit. It is an ordinary case of letting."

The rule of *caveat emptor* was also applied in the recent case of Woods v. Cotton Co., 134 Mass. 357. Defendant was owner of a tenement house fitted for four families, and plaintiff was tenant at will, or wife of tenant at will. There were three stone steps leading down from the yard to the street, on which ice and snow had accumulated, and on which plaintiff slipped and received the injury complained of. There was evidence tending to prove that at the time plaintiff was injured she was in the exercise of due care. The jury viewed the premises. Plaintiff contended that the steps were of such material, and constructed in such manner, that they occasioned the accumulation of snow and ice thereon improperly, and that the defendant's omission to place a rail on either side, or to take other reasonable measures to prevent one from falling, was such negligence as would render the defendant liable; but the trial court held there was no evidence to go to the jury, and directed a verdict for defendant, and the supreme court sustained this ruling. Field J., giving the opinion, says (page 359):

"There may be cases in which the landlord is liable to the tenant for injuries received from secret defects which are known to the landlord and are concealed from the tenant, but this case discloses no such defects in the steps. * * * [Page 361.] The ice and snow were the proximate cause of the injury.

"The exceptions state that no railing had ever been placed on either side of the steps, that the jury viewed the premises, and that it was contended 'that the steps were of such material, and constructed in such manner, that they occasioned the accumulation of ice and snow thereon improperly.' The steps were of rough-split, unhewn granite, and the 'structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the tenement to the time she received her injury.' The defendant was under no obligation to change the original construction of the steps for the benefit of the tenant."

Hazlett v. Powell, 30 Pa. St. 293, was an action of replevin, in which an apportionment of rent was claimed by the tenant of an hotel, on the ground that he had been partially evicted by the act of an adjoining owner in building so that the tenant's light and air from one side of his hotel was shut off or obstructed, and, as a result, that the hotel was rendered *pro tanto* unfit for the purpose for which it was intended to be used. There was an offer to prove certain facts (page 294) which the court states as follows (page 297):

"But the rejected proposition also contained an offer to prove that the lessor knew at the time of executing the lease that the adjoining owner intended building on his lot,—at what time is not offered to be shown,—and did not communicate this information to the lessees. We think he was not bound to do so, and that, if the evidence had been received, it would have furnished no evidence of fraud on the part of the lessor, or become the foundation in equity for relief of the lessees. The substance of the complaint regarded something that the lessor was no more presumed to know than the lessees. It was nothing which concerned the title of the lessor, or the title he was about to pass to the lessee. It was a collateral fact,—something only within the knowledge and determination of a stranger to both parties; and, if material to either, I can see no obligation resting on either side to furnish to the other the information. It was not alleged that the lessor made any representations on the subject, or that there was any concealment of the information; or that any relation of trust and confidence existed between the parties; or that the lessees were misled by his silence, and entered into the contract under the belief that the vacant lot would not be occupied; or that they were in a position in which they could not by diligence have ascertained the fact for themselves, and that they were not legally bound to take notice of the probability that the ground would be occupied by buildings and inquire for themselves. These were elements to be shown to constitute fraud, and make the testimoney available.

"'The general rule, both in law and equity,' says Story on Contracts (section 516) 'in respect to concealment, is that mere silence in regard to a material fact which there is no legal obligation to disclose will not avoid a contract, although it operates as an injury to the party from whom it is concealed.' But the relation, generally, which raises the legal obligation to disclose facts known by one party to the other, is where there is some especial trust and confidence reposed such as where the contracting party is at a distance from the object of negotiation, when he necessarily relies on full disclosure; or where, being present, the buyer put the seller on good faith by agreeing to deal only on his representations. In all these and kindred cases there must be no false representations nor purposed concealments; all must be truly stated and fully disclosed. 'The vendor and vendee,' says Atkinson on Marketable Titles, 134, 'in the absence of special circumstances, are to be considered as acting at arm's length. When the means of information as to the facts and circumstances affecting the value of the subject of sale or equally accessible to both parties and neither of them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract.' *Id.* Illustrative of this is the celebrated case of Laidlaw v. Organ, 2 Wheat. 178. The parties had been negotiating for the purchase of a quantity of tobacco. The buyer got private information of the conclusion of peace with Great Britain, and called very early in the morning following the receipt of it on the holders

of the tobacco, and, ascertaining that they had received no intelligence of peace, purchased it at a great profit. The contract was contested for fraud and concealment. Chief Justice Marshall delivered the opinion of the court, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances which might influence the price, though it were exclusively in his possession. And Chief Justice Gibson, in Kintzing v. McElrath, 5 Pa. St. 467, in commenting on this decision, says: 'It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.' See also, Hershey v. Keembortz, 6 Pa. St. 129. When the information is derived from strangers to the parties negotiating, and not affecting the quality or title of the thing negotiated for, it is not such as the opposite party can call for. We see no error in the rejection of the evidence on account of this part of the proposition, as there was no moral or legal obligation for the lessor to disclose any information he had on the subject of the intended improvement of the adjoining lot. It was not in the line of his title. It was derived from a stranger; it might be true or false; and the lessees could have got it by inquiry, as well as the lessor.

"It is well settled that there is no implied warranty that the premises are fit for the purposes for which they are rented [citing authorities], nor that they shall continue so, if there be no default on the part of the landlord."

In the recent case of Viterbo v. Friedlander, 120 U. S. 712, 7 Sup. Ct. Rep. 962, Mr. Justice Gray, who delivered the opinion of the court, said, in contrasting the doctrines of the common and civil law: "By that law (the common law, unlike the civil law) the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased."

The plaintiff's evidence failed wholly to show that there was any special and secret danger from snowslides which was known only to the railway company, and which could not have been ascertained by the plaintiff. It was, indeed, alleged that "the section house was in a place of danger from snowslides;" but this was plainly the danger that impended over any house placed, as this one necessarily was, on a mountain side in a country subject to heavy falls of snow. The danger referred to was that incident to the region and the climate, and, in the eye of the law, as well known to the plaintiff as to the defendant.

On a careful reading of the plaintiff's evidence we are unable to see that the jury could have been permitted to find any positive act of negligence on the part of the railroad company, or any omission by it to disclose to the plaintiff any fact which it was the company's duty to disclose.

If, then, the plaintiff's case, as it appeared in her evidence, would not have justified a verdict on the ground of negligence or a fraudulent suppression of facts, and as the determination of the nature of the relation between the parties, as that of landlord and tenant, was clearly the function of the court, there would, in our opinion, have been no error if the court had really given a peremptory instruction to the jury to find for the defendant.

However, the record discloses that the court permitted the cases to go to the jury. It is true that the remarks made by the judge must have indicated to the jury that his own view was against the plaintiff's right to recover; but it has often been held by this court that it is not a reversible error in the judge to express his own opinion of the facts, if the rules of law are correctly laid down, and if the jury are given to understand that they are not bound by such opinion. Baltimore & P. R. Co. v. Baptist Church, 137 U. S. 568, 11 Sup. Ct. Rep. 185; Simmons v. U. S. 142 U. S., 148, 12 Sup. Ct. Rep. 171.

It is not necessary for us to review in detail the criticisms made in the several instructions, for, as we have seen, even if such instructions had amounted, in a legal effects to a direction to find for the defendant, no error would have been committed.

It is obvious that these views of the case of Marcella Doyle, claiming for her personal injuries, are equally applicable to her suit, under the statute, for the loss of her children. The latter must be regarded as having entered under their mother's title, and not by reason of any invitation, express or implied from the railway company; and hence they assumed a like risk, and are entitled to no other legal measure of redress.

No error being disclosed by these records, the judgment of the court below is in each case affirmed.

NOTE.—*Liability of Landlord for injuries to Tenant.*—A tenant has no remedy against a landlord for injury from the defective condition of the premises or from suffering the premises to get out of repair, unless the landlord has agreed to keep them in repair. 6 Lawson's Rights, Remedies and Practice, p. 4619; Brewster v. De Fremery, 33 Cal. 341; Doupe v. Genin, 45 N. Y. 119; Joyce v. De Giverville, 2 Mo. App. 596; Loupe v. Wood, 51 Cal. 596; Little v. McAndrus, 29 Mo. App. 332. One who builds and leases houses is bound to construct them in a proper manner and with good materials and competent workmen and neither good faith nor even the best faith will relieve him from liability for injuries resulting from the failure to do so (Carson v. Godley, 26 Pa. St. 111, 67 Am. Dec. 404.); and the lessor is liable if the lessee is injured through concealed and dangerous defects known to the lessor and which a careful examination of the premises by the lessee would not discover. Cowan v. Sunderland, 145 Mass. 363; Coke v. Gutkese, 80 Ky. 298. So if one in letting the upper stories of his building, represents the floors to be strong enough for certain uses, knowing the fact to be otherwise, and the lessee carelessly and negligently over

loads the floors so that they break through, the injured tenant of the lower story may maintain an action against both. Brunswick-Balke Collender Co. v. Rees, 69 Wis. 442. The owner of a tenement house owes to tenants of apartments therein and to strangers rightfully on the premises, the duty of keeping the stairways and hall stairs in safe repair. Looney v. McLean, 129 Mass. 33; Sawyer v. McGillicuddy, 81 Me. 318; but see *contra*, Words v. Cotton Co., 134 Mass. 357, 45 Am. Rep. 344; Purcell v. English, 86 Ind. 34; Bowe v. Hunking, 135 Mass. 380. The landlord of a building is liable for injury to the goods of a subtenant by water which the janitor in the employ of the landlord negligently permits to escape from a wash basin in the building. Pike v. Brittan, 71 Cal. 159. A landlord operating an elevator for the benefit of his tenants is bound to exercise due care for their safety and is liable to them for the negligence of his employees in operating the elevator. Tousey v. Roberts, 114 N. Y. 312. If the landlord in making repairs neglects to use ordinary skill and thereby causes a personal injury to the tenants, he is liable therefor although his undertaking to make the repairs was gratuitous and by the tenant's solicitation. Gill v. Middleton, 105 Mass. 477; Gregor v. Cody (Me.), 19 Atl. Rep. 108. But a landlord who employs a workman is not liable to the tenant for damages resulting from defective work when there is no evidence to show that the man selected was not a competent workman. Morton v. Thurbur, 85 N. Y. 550. In a recent case in Massachusetts it is held that a lessee who sustains personal injuries occasioned by the defective condition of the building cannot maintain an action of tort against the lessor founded upon a breach by the lessor of an agreement to repair the building within a reasonable time. Tuttle v. Gilbert Manuf. Co., 145 Mass. 169.

A tenant cannot recover for injuries received from the bad condition of the passage way leading to her tenement, which is common to several tenements demised by the landlord, where she leased it knowing its condition. Quinn v. Perham (Mass.), 23 N. E. Rep. 735.

In the absence of covenants to repair, a landlord's duty to his tenant does not require that he should shore up a wall endangered by an excavation of the adjoining lot, although he has received due notice thereof, and he is not liable for an injury caused to the tenant's stock of goods by the falling of the wall in consequence of negligent excavation. Ward v. Fagin (Mo.), 14 S. W. Rep. 738.

Where a tenant, who has lived in a building thirteen years, goes for a trifling purpose down the cellar stairs, which she knows to be "rotten and rickety" and the stairs break, and she is injured, she cannot recover damages therefor from her landlord, though he has been notified of the condition of the stairs, and has promised to repair them, and has failed to do so. Town v. Armstrong (Mich.), 42 N. W. Rep. 983.

Defendant was the owner of a building, on the second floor of which were several tenements, all of which were leased to different tenants. There was one stairway for the accommodation of all, and used in common by them. Plaintiff was one of the tenants, and while in the proper use of the stairway was injured by the falling of the landing. Held, that defendant as owner and landlord, in the absence of an express agreement to the contrary, was bound to suitably care for and maintain for the tenants the stairway, at his own expense. Sawyer v. McGillicuddy (Me.), 17 Atl. Rep. 124.

Warranty as to Condition of House.—There is as a rule no implied covenant that the premises are or will remain in a tenantable condition (6 Lawson's Rights, Remedies and Practice, p. 4622; Foster v. Peyser, 9 Cush. 242) or are reasonably fit for habitation (Lucas v. Coulter, 104 Ill. 81) or are fit or suitable for the purpose for which they are intended to be used (Wilkinson v. Clauson, 29 Minn. 91; Clark v. Babcock, 23 Mich. 164; Murrell v. Jackson, 33 La. Ann. 134; Murry v. Albertson, 50 N. J. L. 167) or are expressly designed for. Murry v. Albertson, *supra*. Consequently their unfitness for such a purpose will not justify the tenant in abandoning the premises and on such grounds making defense to an action for rent, unless there has been a fraudulent misrepresentation or concealment by the lessor as to the state or condition of the premises or the premises are uninhabitable by reason of some wrongful act or default of the lessor. The maxim *caveat emptor* applies to the letting of houses, and the lessor is not bound to disclose defects in the premises. McGlashan v. Tallmadge, 37 Barb. 313; Davis v. Smith, 15 Mo. 467; Libbey v. Tolford, 48 Me. 316; Bowe v. Hunking, 135 Mass. 380. The landlord is exempt from liability for injuries caused by such defects in the building, in the absence of warranty, fraud, deceit or misrepresentation. Davidson v. Fisher, 11 Colo. 583, 7 Am. St. Rep. 267. A representation that a house is new and in perfect order is not a warranty that it shall continue habitable. Fowler v. Stevens, 48 N. Y. Sup. Ct. 479. A representation that a building is "good, strong and substantial and fit for the hatter's business" is not a warranty that it is not leaky. Schermerhorn v. Gouge, 13 Abb. Pr. 315. Where a statute provides that tenement houses shall be provided with fire escapes, the landlord is liable for damages caused by an omission to provide them. Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; Rose v. King (Ohio), 30 N. E. Rep. 267.

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WEEKLY DIGEST

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1. ABUSE OF CIVIL PROCESS—Notice not to pay Claim.—The mere giving of a notice by a third person to a debtor not to pay the creditor the amount due him under a contract is neither the use nor abuse of legal process; and no action can be maintained by the creditor against the person giving the notice for the delay in the payment, and the expense of a lawsuit which he was compelled to bring against the debtor, in consequence of such notice, though it may have been given maliciously and vexatiously.—NORCROSS V. OTIS BROS. & CO., Penn., 25 Atl. Rep. 575.

2. ACCIDENT INSURANCE.—Plaintiff's intestate held an accident and death policy in defendant company, which provided that defendant would not be liable for injury resulting from, or attributable partially or wholly to, his being upon a railroad bridge, trestle, or roadbed. Deceased's dead body was found beside a railroad track, he having been last seen alive the evening before, and no one knew how or when he was killed: Held, where defendant did not deny that death resulted from accidental injuries, visible on deceased's person, that the jury were properly instructed that, to prevent a recovery, they must be satisfied that deceased broke the conditions of the policy.—DOUGHERTY V. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA, Penn., 25 Atl. Rep. 739.

3. ADMINISTRATION — Accounting by Executors.—Where the final distribution of an estate by an executor is by the will deferred for a considerable time after the settlement of his account, he will not, in the allowance of commissions upon that accounting, be paid for that distribution, or be paid commissions at the highest rate permitted by the statute. The court will reserve a portion of that which it may allow for his final compensation when he shall have completely performed his duty.—CONOVER V. ELLIS, N. J., 25 Atl. Rep. 701.

4. ADMINISTRATOR—Power to Borrow Money.—Under How. Ann. St. § 6105, as amended by Laws 1889, Act 67, providing that an administrator may borrow money to pay the "debts against the estate" of any deceased person, an administrator may borrow money to release a "mortgage" on decedent's property, even though the mortgage was not the personal debt of the decedent, as such mortgage is a "debt against the estate," as contemplated by this section.—IN RE LAMBIE'S ESTATE, Mich., 54 N. W. Rep. 173.

5. APPEAL—Amendment of Judgment.—Where an appeal bond is signed by one Ball as surety, but by a clerical error the judgment is against Bell, and the record shows the error and contains the data necessary to correct it, the error should be corrected by the trial court on motion of any party to the judgment.—FIRST NAT. BANK OF SANTA MONICA V. KOWALSKY, Cal., 31 Pac. Rep. 1133.

6. ASSAULT—Self-defense.—Defendant who undertook to inflict physical punishment on plaintiff for opprobrious epithets applied by plaintiff to him, cannot urge, as a justification for his mutilation of plaintiff's person, that it became necessary for him so to do to repel plaintiff's blows, where plaintiff was using no unnecessary force to repel the assault, and defendant, who was the aggressor, did not in any manner indicate a change of purpose and a desire to stop the conflict.—SHIPLEY V. EDWARDS, Iowa, 54 N. W. Rep. 151.

7. ASSIGNMENT OF CAUSE OF ACTION.—An action for fraudulent representations, by which the owner of two-thirds of the capital stock of a corporation was induced to part with one-half of it to defendants who made the representations with a view to obtaining control of the corporation and wrecking it, cannot be maintained by the owner for the use of his assignee, since the right to complain for fraud is not assignable; but trover will lie for the conversion of such stock by defendants, since a right of action for the conversion of property is assignable.—SMITH V. THOMPSON, Mich., 54 N. W. Rep. 168.

8. ATTACHMENT OF PERSONAL PROPERTY.—A suit may be maintained by an attaching creditor of personal property that is in possession of the sheriff under the attachment for the purpose of removing clouds upon it, created by mortgage or otherwise, that would affect its sale; and either party may appeal from a judgment in the proceeding affecting his rights.—VOSS V. MURRAY, Ohio, 32 N. E. Rep. 1112.

9. BANKS — Certificate of Deposit.—The payee of a certificate of deposit, who has not the possession, and who confesses his inability to surrender it on payment, cannot recover against the bank, when it appears by his own showing that the paper is not lost, but is in the hands of another, though wrongfully, who produces it on the trial, but refuses to surrender it, and claims title to it in hostility to the payee.—READ V. MARINE BANK OF BUFFALO, N. Y., 32 N. E. Rep. 1083.

10. BILL OF EXCEPTIONS—Signing by Ex-judge.—Rev. St. § 2649, relating to the bill of exceptions, provides that it must be reduced to writing and presented "to the court, or to the judge thereof in vacation, within the time given for allowance. If true, it shall be the duty of the court, if presented in open court, or the judge before whom the cause was tried, if presented in vacation, to allow and sign it. If the writing is not true, the court or the judge in vacation shall correct it," and then sign it: Held, that the ex judge who tried the case is the proper person to allow and sign the bill if presented within the time fixed by order of the court. Where the times for the commencement of terms of court are fixed by an act of the legislature, but not the duration or time of ending the terms, a district court may adjourn a term in one county of the district over any intervening term in another county, and the proceedings of such adjourned term are regular, and not *coram non judice*. — STIRLING V. WAGNER, Wyo., 31 Pac. Rep. 1032.

11. CARRIERS—Passengers.—It is not negligence for a carrier to start its train at a station before a person who has assisted a passenger on board has had time to get off, unless it has notice of his intention to get off.—YARNELL V. KANSAS CITY, FT. S. & M. R. CO., Mo., 21 S. W. Rep. 1.

12. CARRIERS — Passenger. — Plaintiff purchased a ticket over defendant's road, entitling her to passage

on its train to one of its stations, but the train carried her a quarter of a mile beyond her destination, and against her objection the conductor ejected her at that point, and she was obliged to walk back to her station, from which exposure she became sick: Held, a good cause of action. The action thus arising is on the "implied contract" to carry plaintiff safely to her destination, and is not an action "*ex delicto*." — EVANSVILLE & R. R. CO. v. KYTE, Ind., 32 N. E. Rep. 1134.

13. CARRIERS—Passenger—Damages. — Where a passenger is wrongfully ejected from a railroad car, in a forcible and violent manner, but without physical injury, the jury, in assessing his damages, may consider his injured feelings, the indignity endured, his mental suffering, and wounded pride. — GORMAN V. SOUTHERN PAC. CO., Cal., 31 Pac. Rep. 1112.

14. CHATTEL MORTGAGE—Description.—The question of the sufficiency of the description in a mortgage to render it competent evidence is for the court; but, when the description is admitted, the identity of the property claimed with that described in the mortgage is a question for the jury. — ANDREGG V. BRUNSKIEL, Iowa, 54 N. W. Rep. 135.

15. CHATTEL MORTGAGE—Possession.—A mortgage of a stock of merchandise, not recorded, which by its terms permits the mortgagor to retain possession of and sell the stock without restriction, and which contains no requirement that the proceeds shall be used in payment of the mortgage debt, or that any accounting shall be made for the proceeds, operates as a fraud upon the creditors of the mortgagor, and is void. —CHAPIN V. JENKINS, Kan., 31 Pac. Rep. 1084.

16. CHATTEL MORTGAGES — Record.—Laws 1833, ch. 279, § 1, which provides that a mortgage of chattels not accompanied by an immediate delivery, and an actual and continued change of possession, shall be absolutely void, "as against creditors of the mortgagor," unless filed in the proper office, applies, not only to creditors who become such after the execution of the mortgage, but also to those whose debts existed before that time.—KARST V. GANE, N. Y., 32 N. E. Rep. 1073.

17. CONSTITUTIONAL LAW — Citizenship of Corporation.—A corporation is not a citizen of the United States, nor a person, within the meaning of Const. U. S. amend. 14, § 1, which provides that a State shall not make any law abridging the privileges of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.—STATE V. BROWN & SHARPE MANUF. CO., R. I., 25 Atl. Rep. 246.

18. CONTRACTS — Construction.—An agreement by a pledgee to apply the surplus income of the pledged fund to the payment of a claim due a specified creditor of the pledgeor, "said fund being held as collateral security for a loan" made by the pledgee, binds the pledgee to pay over the surplus income until the creditor's claim is satisfied, and not merely as long as he holds the fund as collateral security for his own claim.—PECK V. GOFF, R. I., 25 Atl. Rep. 690.

19. CONTRACT —Damages.—In an action to recover a balance due on a building contract that contained a clause providing for the payment of a penalty in default of completion within a certain time, the work not being finished within the specified time, defendant, under the penal clause, is entitled to show the actual rental value of the building as adapted to its particular business, and is not confined to the rental value for general business purposes.—COCHRAN V. PEOPLE'S RY. CO., Mo., 21 S. W. Rep. 6.

20. CONTRACT—Negligent Payment.—In an action to recover damages for the breach of a contract to build the foundation of a house it appeared that two stone piers were so defectively built that it was necessary to rebuild them, and that the walls were otherwise faulty; plaintiff had paid the contract price before discovering the defects which were not apparent: Held, that a contention that, having negligently paid the money without examination, plaintiff cannot recover it, is untenable, since the doctrine applies only to defects which are apparent.—BARKER V. NICHOLS, Colo., 31 Pac. Rep. 1024.

21. CONVERSION—Excessive Judgment. — Where an action is brought for the wrongful conversion of live stock, and it appears from the record that plaintiff obtained judgment for the value of a greater number of animals than he had any right to or interest in, the judgment will be reversed, and a new trial granted.—GEORGE R. BARSE LIVE STOCK & COMMISSION CO. V. GUTHRIE, Kan., 31 Pac. Rep. 1071.

22. CORPORATIONS—Contracts.—Where extra work is done by a contractor for a corporation, with knowledge of a majority of the directors, and upon the assurance of one of them that the company will pay for it, and upon the after-assurance that there had been a meeting at which the company had in fact agreed to pay, this is sufficient, regardless of whether the director had any authority to make such assurance, or even whether he told the truth about the meeting, to raise an obligation on the part of the company to pay for such work as it receives the benefit of.—TRYON V. WHITE & CORBIN CO., Conn., 25 Atl. Rep. 713.

23. COUNTIES— Liabilities.—Const. art. 11, § 10, provides that "no county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of $5,000, except to suppress insurrection or repel invasion; but the debts of any county at the time this constitution takes effect shall be disregarded in estimating the sum to which such county is limited:" Held that, in an action to restrain the payment by the county of a liability incurred after such county was already indebted for a sum in excess of the constitutional limit, the complaint is bad where it merely alleges the indebtedness, but does not show for what it was incurred.— BURNETT V. MARKLEY, Oreg., 31 Pac. Rep. 1050.

24. CRIMINAL EVIDENCE—Assault.—In a criminal prosecution for assault with the intent to kill, where the defendant interposes the defense of self-defense, and introduces evidence upon that subject sufficient to go to the jury, and the defendant also offers to introduce evidence of another difficulty occurring a short time previously between the same parties, leading to the last difficulty, in which previous difficulty it is claimed that the alleged assaulted party was also the aggressor, and the court excludes the evidence, held error.—STATE V. SCHLEAGEL, Kan., 31 Pac. Rep. 1105.

25. CRIMINAL LAW — Larceny — Presumption.—On a trial for larceny from the person, the presumption of law is that the property belonged to him from whose possession it was taken. — PEOPLE V. DAVIS, Cal., 31 Pac. Rep. 1109.

26. CRIMINAL LIBEL—Indictment.—An indictment for libel, containing a verbatim statement of the defamatory matter published, but no averment as to the manner of publication, otherwise than by mere speech, or the person or persons to whom it was addressed or by whom it was seen, or that such facts were unknown to the grand jurors, is insufficient, since it does not contain a plain and concise statement of the act constituting the crime.—PEOPLE V. STARK, N. Y., 32 N. E. Rep. 1046.

27. CRIMINAL TRIAL—Challenging Jurors.—Where it is conceded that a court has discretionary power to permit a premptory challenge of a juror after he is sworn, it is no abuse of discretion to give the permission to the State, on the assurance of the prosecuting officer of undisclosed disqualifying facts, even after defendant had exhausted his peremptory challenges, and before the introduction of evidence.—PEOPLE V. HUGHES, N. Y., 32 N. E. Rep. 1105.

28. DAMAGES—Evidence.—Damages cannot be proved by asking the plaintiff how much he was damaged.—UPCHER V. OBERLENDER, Kan., 31 Pac. Rep. 1080.

29. DECEIT—Evidence. — Where plaintiff relying on defendants' representations that an irrigating company was free of debt, executed an escrow agreement with them to purchase some shares of the company's stock, and, on assigning his right to purchase, was

obliged to discharge a lien on the stock, of which lien defendants knew at the execution of the agreement, this agreement is competent evidence in an action against defendants to recover the amount so paid, as being a part of the transaction between the parties.—LEWIS V. DODGE, Colo., 31 Pac. Rep. 1022.

30. DEED—Sale.—The recital in an instrument of sale that there was conveyed "that certain store, and all the stock and goods therein, and the bakery attached thereto and the tools and fixtures of said bakery," will be construed as conveying the land on which the store and the bakery attachment stand, and so much as may be necessary for their ordinary use.—POTTKAMP V. BUSS, Cal., 31 Pac. Rep. 1121.

31. DEED A MORTGAGE.—Where, in an action in equity to declare a deed absolute on its face to be a mortgage, the answer speaks of the consideration in the deed as "borrowed money," and defendant, in his testimony refers to it as a "loan," and all the evidence supports plaintiff's contention that the deed was given as security for a debt due defendant, such deed will be declared a mortgage.—BAIRD V. REININGHAUS, Iowa, 54 N. W. Rep. 148.

32. DIVORCE—Community Property.—In an action for a divorce it is not an abuse of discretion for the trial court to set off to plaintiff the homestead and a small amount of personalty from the community property, leaving to defendant all other community property.—BOYD V. BOYD, Cal., 31 Pac. Rep. 1108.

33. ELECTIONS — State Legislature — Certificate of Election.—While each house of the legislature is by the constitution made the judge of the election and qualification of its members, the courts will by *mandamus* compel the proper canvassing officers to discharge their duties, and issue certificates of election to the parties who, from the returns, appear to have been elected thereto; but the awarding of a certificate of election in obedience to the mandate of the court will not conclude the legislature in determining the question in proceedings by contest.—STATE V. VAN CAMP, Neb., 54 N. W. Rep. 113.

34. EQUITABLE COUNTERCLAIM.—Plaintiff was the assignee of an agreed sum due from defendant on an insurance policy in settlement of a loss, and brought an action at law for its recovery. Defendent, in its counterclaim, alleged fraud in procuring the settlement, and asked the intervention of a court of equity either to set it aside or to reform it: Held, that the fraud constituted a clear defense at law, and therefore the counterclaim was demurrable.—COMMERCIAL BANK OF MILWAUKEE V. FIRE INS. CO. OF COUNTY OF PHILADELPHIA, Wis., 54 N. W. Rep. 109.

35. EQUITY—Fraud.—The rule is that, when parties seek to set aside a conveyance on the ground of fraud, they must return, or offer to return, all they have received under it. There must be a tender, or offer to return the amount received, or there must be a just and valid excuse shown for failure of tender.—DUNBAR V. SEVERANCE, Kan., 31 Pac. Rep. 1055.

36. EVIDENCE—Secondary Evidence.—Before secondary evidence of a private writing can be received, a party must in general show the loss or destruction of the original, or that he has used reasonable efforts and the means which were accessible to him to find the writing or to procure its production; and, if it appears to be in the hands of the adverse party, notice to produce the original is necessary in order to lay the foundation for the introduction of secondary evidence.—ROBERTS V. DIXON, Kan., 31 Pac. Rep. 1083.

37. EXECUTION—Waiver of Exemption.—A waiver of the exemption laws of Kansas, by the lessee in a lease, does not operate as a waiver of the exemption created in paragraph 4589, Gen. St. 1889, exempting the wages of a debtor having a family dependent on his earnings for support.—BURKE V. FINLEY, Kan., 31 Pac. Rep. 1065.

38. FALSE IMPRISONMENT.—An action for false imprisonment will not lie for an arrest made under lawful process, though wrongfully obtained, the remedy being an action for malicious prosecution.—HOBBS V. RAY, R. I., 25 Atl. Rep. 694.

39. FEDERAL COURTS—Circuit Courts—Jurisdiction.—In a suit by a railroad company against the treasurers of a number of counties through which the railroad runs, to enjoin the collection of taxes, the jurisdictional amount cannot be made up by taking the sum of the amounts in respect to which the several treasurers are sought to be enjoined; but the jurisdiction as to each treasurer must be determined by the amount in controversy between him and the railroad company.—WALTER V. NORTHEASTERN R. CO., U. S. S. C., 13 S. C. Rep. 348.

40. FRAUDS, STATUTE OF—Improvements.—A notice by a vendor to a vendee, in a land contract invalid under the statute of frauds, not to take possession of the premises or make improvements thereon, will not prevent the vendee from recovering the value of improvements thereafter made and taxes paid by him, if the vendor's subsequent conduct was such as to induce the vendee to believe that he withdrew the notice, and intended to perform the contract.—HOLTHOUSE V. RYND, Penn., 25 Atl. Rep. 760.

41. FRAUDULENT CONVEYANCES—Chattel Mortgages.—Where F was indebted in large sums to plaintiff and to other dealers for goods, plaintiff had a right to extend credit to F, though he knew him to be in a failing condition, and to take a chattel mortgage on F's stock of goods to secure his debt in preference to other creditors, and it was not a badge of fraud to do so.—FERRIS V. MCQUEEN, Mich., 54 N. W. Rep. 164.

42. GARNISHMENT—Answer of Garnishee.—Where the garnishee in its answer sets up that the check in its possession, alleged to be the property of defendant, had been transferred by defendant to A before the garnishment, it is reversible error to permit the garnishee to show on the trial that the check had been assigned to B before the garnishment.—JOHN R. DAVIS LUMBER CO. V. FIRST NAT. BANK OF MILWAUKEE, Wis., 54 N. W. Rep. 108.

43. HUSBAND AND WIFE — Community Property.—A wife who separated from her husband before his removal to Washington, and who ceased to communicate with him for nearly 20 years, without any desire or effort to assert any of her marital rights, thus placing him in a position where he would appear as a single man, is estopped from asserting her community rights in land acquired by the husband from his earnings after his removal, as against innocent purchasers from him in good faith and for value.—NUHN V. MILLER, Wash., 31 Pac. Rep. 1031.

44. HUSBAND AND WIFE—Divorce Proceedings.—Where a husband permits his wife to carry on business in her own name, either as his agent or as his partner, a subsequent separation and commencement of divorce proceedings, by the wife will not operate to terminate the husband's liability for goods bought thereafter for such business, where the vendor deals with her on the faith of her former relation, unless notice or knowledge of the separation is brought home to him.—SNELL V. STONE, Oreg., 31 Pac. Rep. 663.

45. HUSBAND AND WIFE—Joint Lease.—One who has leased land to husband and wife jointly, and put them jointly in possession, is estopped to allege that they have no right to join in a suit against him for damages sustained in unlawfully disturbing them in their possession.—GILLESPIE V. BEECHER, Mich., 54 N. W. Rep. 167.

46. INSURANCE — Knowledge of Agent.—The knowledge of the general agent of an insurance company, who writes and issues a policy of insurance, concerning the title of the premises insured, is the knowledge of the insurance company.—CAPITOL INS. CO. V. BANK OF PLEASANTON, Kan., 31 Pac. Rep. 1069.

47. INSURANCE—Severable Contract.—Where a policy of insurance is so written as to place separate valuations upon different subjects of insurance, the contract

is severable, and a breach of the contract only affects the insured property which is the immediate subject of the act of alienation.—CONTINENTAL INS. CO. OF THE CITY OF NEW YORK v. WARD, Kan., 31 Pac. Rep. 1079.

48. INSURANCE POLICY.—A policy issued by an insurance company on the buildings and stock of a farmer, which varies from the application made by the insured, in that it insures only part of the property against loss from tornadoes, instead of all, does not constitute a binding contract until it has been accepted by the insured; and no liability attaches on the policy for a loss occurring before its delivery to the insured by the agent to whom it had been sent for that purpose.—STEPHENS v. CAPITAL INS. CO., Iowa, 54 N. W. Rep. 139.

49. INSURANCE PREMIUM—Consideration.—A note in payment of the premium was given to the agents of a life insurance company with an application for a policy, so as to obtain insurance at once, instead of waiting for the action of the company on the application. The contract signed and delivered to defendant by the agent purported to give the insurance, subject to conditions on the bank, one of which was that the contract was not valid unless the premium was "actually paid in cash." The agents had no authority to alter the contract in this respect, and the company did not waive this condition: Held, that there was no consideration for the note.—DUNHAM v. MORSE, Mass., 32 N. E. Rep. 1116.

50. INTOXICATING LIQUORS—Contempt.—Code, § 1543, which authorizes any citizen of the county where a liquor nuisance is kept to maintain an action to perpetually enjoin and abate the same, and which renders a violation of such injunction a contempt, empowers the citizen to employ counsel, not only in the action for injunction, but also to prosecute for the contempt, without any appearance by the county attorney.—MALONEY v. TRAVERSE, Iowa, 54 N. W. Rep. 155.

51. INTOXICATING LIQUORS — Information.—An information charging that at a certain time and place the defendant, "being then and there a person not lawfully and in good faith engaged in the business of a druggist, did then and there unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors," being within the language of paragraph 2527, Gen. St. 1889, is sufficient; but in such a case it is the duty of the prosecution to show that the defendant, although having a permit, "is not a person lawfully and in good faith engaged in the business of a druggist."—STATE v. TANNER, Kan., 31 Pac. Rep. 1096.

52. INTOXICATING LIQUORS.—S, a saloon keeper, while intoxicated in his own saloon, shot and killed the plaintiff's husband: Held, that the drinking of the liquor by S was not a traffic in intoxicating liquor, within the meaning of the law, or such as will render his sureties liable in an action upon his bond.—CURTEN v. ATKINSON, Neb., 54 N. W. Rep. 131.

53. JUDGMENT—Attachment Lien.—Code Civil Proc. § 671, provides that from the time a judgment is filed it becomes a lien on all the real property of the judgment debtor not exempt from execution in the county, owned by him "at the time," and that the lien continues for two years, "unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, as provided in this Code, in which case the lien ceases:" Held, that where an attachment debtor conveyed land after it was attached, but before judgment, there was no judmgent lien thereon into which the attachment lien could merge, and the latter was not released by the execution of a bond on appeal from the judgment. — RILEY v. NANCE, Cal., 31 Pac. Rep. 1126.

54. JUDGMENT — Injunction. — Where a judgment recovered against plaintiffs as garnishees is void, an injunction restraining the defendants from collecting the judgment by execution was properly granted. — RICE v. AMERICAN NAT. BANK OF DENVER, Colo., 31 Pac. Rep. 1024.

55. JUDGMENT—Parties—Error.—All parties to a joint judgment who would necessarily be affected by a reversal or modification of the same are necessary parties to a proceeding in error to review such judgment, and the absence of such a necessary party will defeat the jurisdiction of the appellate court, and prevent the review of any part of the judgment.—BARBER ASPHALT PAVING CO. v. BOTSFORD, Kan., 31 Pac. Rep. 1106.

56. JUDGMENT—Res Judicata.—A judgment denying a petition to open a judgment entered on a bond, with power of attorney to confess judgment, on the ground of fraud and want of consideration of the bond, is *res judicata* as to those questions; and they cannot afterwards be pleaded in defense to a foreclosure of the mortgage given as collateral to such bond. — HEILMAN v. KROH, Penn., 25 Atl. Rep. 752.

57. JUDGMENT—Res Judicata.—In an action in equity by a town against the bondholders to cancel certain bonds alleged to be invalid on certain grounds, a judgment declaring the bonds to be valid is *res judicata* of the questions involved, and estops the town to plead their invalidity on the same grounds in a subsequent action on the bonds by the holders.—WILLIAMSBURGH SAV. BANK v. TOWN OF SOLON, N. Y., 32 N. E. Rep. 1058.

58. LANDLORD AND TENANT—Damages. — In an action by a tenant for damages to his growing crops, and for undermining his house, resulting from the removal of gravel from the land, where the defense relied on is payment of such damages assessed to the landlord under condemnation proceedings, the answer is not bad, on demurrer, for want of a copy of such proceedings.—SHAUVER v. PHILIPS, Ind., 32 N. E. Rep. 1131.

59. LANDLORD AND TENANT—Notice to Quit. — Where a tenant in possession under a lease for a term assents with the landlord to a termination of his lease, and continues to hold from day to day under a new arrangement, he is not entitled to a month's notice to quit.—LANE v. RUHL, Mich., 54 N. W. Rep. 175.

60. LIBEL—Ridicule.—In a newspaper article published of and concerning plaintiff, whose name is "Buckstaff," it is libelous *per se* to refer to him as "Bucksniff," as such appellation is a term of reproach, by reason of its similitude to "Pecksniff."—BUCKSTAFF v. VIALL, Wis., 54 N. W. Rep. 111.

61. LIMITATIONS—Concealing Cause of Action.—In an action against the wife of a debtor to recover money given to her by her husband in fraud of creditors, where the gift was made more than six years before the action was commenced, the fact that on the trial of a former action the debtor and his wife swore that no gift was made to her shows they were concealing the fraud, and the statute of limitations did not begin to run until the fraud was discovered.—SMITH v. BLAIR, Ind., 32 N. E. Rep. 1123.

62. MANDAMUS — Town Treasurer.—*Mandamus* will not issue to a town treasurer to compel the payment of an order issued by the town clerk on a claim allowed by the town council in petitioner's favor, where the treasurer contends, and offers proof to show, that the order was erroneously issued, that the claim is fraudulent, and that the town is not indebted to petitioner, but petitioner will be remitted to his action at law, as it is only in a clear case of indebtedness on the part of a municipal corporation that the court will compel payment by *mandamus*.—SIMMONS v. DAVIS, R. I., 25 Atl. Rep. 691.

63. MANDAMUS TO COUNTY SUPERVISORS.—Where the majority of the board of supervisors of a county wilfully vote money for a fraudulent purpose, and include the amount so voted in the county taxes apportioned among the various townships, *mandamus* will not lie at the instance of the majority of the board to compel the supervisors who opposed the fraud to spread on their respective assessment rolls their proportion of such fraudulent tax, for, though each supervisor is charged by statute with the

express duty of spreading his proportion of the taxes on the assessment rolls, he will not be com manded by a court of equity to do so when the effect would be to aid a fraud.—BOARD OF SUP'RS OF CHEBOYGAN COUNTY v. SUPERVISOR OF TOWNSHIP OF MENTOR, Mich., 54 N. W. Rep. 169.

64. MASTER AND SERVANT—Contract of Hiring.—Plaintiff, on June 2, 1890, entered into a written contract with defendants, which recited that defendants agreed to pay plaintiff $35 a week for his services as fur cutter, and for the year 1891, the above mentioned salary and 5 per cent. of the net profits of the business. Plaintiff was discharged on February 28, 1891: Held, in an action to recover the whole amount called for under the contract, that such contract covered the whole of the year 1891, and was not on agreement to employ plaintiff for one year only.—KOEHLER v. BUHL, Mich., 54 N. W. Rep. 157.

65. MASTER AND SERVANT—Fellow-servants. — A foreman whose duty it is to prepare dynamite cartridges for blasting, and to direct the work of certain laborers, though not to hire or discharge, is a fellow-servant of such laborers.—SULLIVAN v. NEW YORK, N. H. & H. R. Co., Conn., 25 Atl. Rep. 711.

66. MASTER AND SERVANT — Knowledge of Defects. —Plaintiff's intestate, a section hand in the employ of defendant, was, while propelling one of its hand cars, thrown therefrom by the breaking of the car handle, which was defective, and sustained injuries from which he died. The defect was not patent, and was not known to plaintiff's intestate, and was only known to one of defendants employees,—the carpenter who made the handle: Held, that his knowledge was not sufficient to bind defendant with notice of such defect, and, it appearing that defendant had provided a competent inspector to see that suitable appliances were furnished its employees, no action would lie for the death of plaintiff's intestate.—INDIANA, I. & I. RY. CO. v. SNYDER, Ind., 32 N. E. Rep. 1129.

67. MASTER AND SERVANT—Negligence of Fellow-servant.—A corporation working a mine by a general superintendent is not responsible for an injury to a miner which resulted from the negligence of a person employed to point out to the miners the places where holes were to be drilled, and who had authority to hire and discharge workmen.—GILMORE v. OXFORD IRON AND NAIL CO., N. J., 25 Atl. Rep. 707.

68. MASTER AND SERVANT—Risks of Employment.—Plaintiff fell from a run in defendant's coal shed because there were no guards; and, in an action for the injuries received, it appeared that from time to time, for 15 years, plaintiff had worked for defendant on the same and similar runs which were in the same condition: Held, that plaintiff could not recover, as he must have known of the dangers to which he would be exposed when he was employed.—OMALEY v. SOUTH BOSTON GASLIGHT CO., Mass., 32 N. E. Rep. 1119.

69. MECHANIC'S LIEN.—In an action to foreclose a mechanic's lien, where the plans and specifications were made a part of the building contract, and were not filed as required by section 1183, Code Civil Proc., and were therefore "wholly void, and no recovery shall be had thereon," though the contract was void, it might be used as evidence to show the character of the building to be erected, and thereby furnished the test by which it could be known when the building was completed, and the time when lien proceedings should be begun.—BARKER v. DOHERTY, Cal., 31 Pac. Rep. 1117.

70. MECHANIC'S LIEN—Contract of Purchase.—As a general rule a person in possession of land under a contract to purchase the same cannot, to the prejudice of the legal owner, subject either the land, or buildings erected by him thereon, to a mechanic's lien; but by the mechanic's lien law of this State the general rule has been changed as to the buildings erected on the land, but not as to the land itself.—PINKERTON v. LE BEAU, S. Dak., 54 N. W. Rep. 97.

71. MECHANIC'S LIEN—Discharge.—The fact that plaintiff, who took a note on account of work performed, but not as payment, negotiated the same, does not destroy his lien, where, before filing his claim, he had redeemed the note, and afterwards surrendered it in court.—DAVIS v. PARSONS, Mass., 32 N. E. Rep. 1117.

72. MECHANICS' LIENS—Statement.—Mills' Ann. St. pp. 1609 1618, §§ 2887, 2876, declare that whoever does any work on a building shall have a lien, but that there must be a statement filed, showing the name of the claimant, the person doing the work, description of the property, total amount of the indebtedness, credit thereon, if any, and the balance due such claimant: Held, that a statement made by one to whom a number of claims had been assigned, showing merely the total, and not the amount of each claim, is insufficient.—HANNA v. COLORADO SAV. BANK, Colo., 31 Pac. Rep. 1020.

73. MINING LEASE—Reservation.—A reservation, in a lease of land for coal mining purposes, of the "ground" east and south of a designated building, includes not only the surface, but everything thereunder.—OSKALOOSA COLLEGE v. WESTERN UNION FUEL CO., Iowa, 54 N. W. Rep. 152.

74. MORTGAGE — Alteration.—Where a mortgagee, after the execution and delivery of the mortgage, alters it by inserting a clause to the effect that *scire facias* may issue in case of 20 days' default in payment, the alteration absolutely avoids the mortgage. —MCINTYRE v. VELTH, Penn., 25 Atl. Rep. 739.

75. MORTGAGE—Redemption.—Code, § 3106, relating to the right of defendants and creditors to redeem, provides that the terms of redemption in all cases will be the reimbursement of the amount paid by the then lien holder, added to the amount of his own lien, with interest, subject to the exceptions contained in the next section. Section 3107 provides that, "when a senior creditor thus redeems from his junior he is required to pay off only the amount of those liens which are paramount to his own," with interest and costs: Held, that a mortgagee is not entitled to redeem from a junior judgment lien, since the statute only contemplates a redemption from a junior creditor when, by redemption or otherwise, he becomes the holder of a paramount lien.—LYSINGER v. HAYER, Iowa, 54 N. W. Rep. 145.

76. MUNICIPAL BONDS — Constitutional Law.—Act March 5, 1891, providing that cities of a certain class may incur bonded indebtedness to an amount not exceeding 4 per cent. of their assessed valuation, though in conflict with Const. art. 13, § 6, which provides that cities of such class may become indebted only 3 per cent. of the value of the taxable property therein, is void only to the extent of the repugnancy in fixing the amount at 4 instead of 3 per cent.; and therefore bonds issued by a city under such act are valid, if it appears that the debt created thereby is within the constitutional limit.—DUNN v. CITY OF GREAT FALLS, Mont., 31 Pac. Rep. 1017.

77. MUNICIPAL CORPORATION— Ordinances.—Act Feb. 8, 1865, amending the charter of the city of St. Joseph, provides that the mayor and city council shall have power by ordinance to levy and collect certain taxes which are named in nine sections. Section 10 gives them power "to regulate the erection of wooden buildings within such limits as may be prescribed by ordinance, and remove the same when erected contrary thereto:" Held, that a resolution of the city council, not presented to the mayor for his approval, is ineffectual to grant a permit to erect a wooden building within the limits prescribed by ordinance, since not only the limits, but the wooden buildings to be erected within such limits, must be regulated by ordinance.—EICHENLAUB v. CITY OF ST. JOSEPH, Mo., 21 S. W. Rep. 8.

78. MUNICIPAL CORPORATIONS — Ordinance.—An ordinance of a city prohibiting the collection and marching of crowds and processions, and the making of noise

with musical instruments and otherwise on the streets and sidewalks, so as to obstruct travel, frighten horses interfere with business, or disturb others, is not unreasonable and invalid because it makes it the duty of the mayor or city marshal first to order the offenders to desist, and provides that "the failure or refusal of any person or persons to promptly obey such order" is a misdemeanor, since the gravaman of the offense is the commission of the prohibited acts, and not the disobedience of such order.—CITY OF CHARITON v. FITZSIMMONS, Iowa, 54 N. W. Rep. 146.

79. MUNICIPAL CORPORATION—Streets.—A city ordinance authorized defendant railroad company to construct its railroad through one of the city streets, and authorized and required it to construct an embankment at the intersection of the street with another street, on which plaintiff's property abutted. Such embankment was constructed under the direction of the city engineer, and it extended in front of plaintiff's premises: Held that, as the city could have constructed the embankment without liability to plaintiff, it could authorize the railroad to construct it, and defendant was not liable for damages caused thereby.—RAUENSTEIN v. NEW YORK, L. & W. RY. CO., N. Y., 32 N. E. Rep. 1047.

80. NAMES—Idem Sonans.—The names "Johnston" and "Johnson" are pronounced so nearly the same by the generality of mankind that they are *idem sonans*.—MILTONVALE STATE BANK v. KUHNLE, Kan., 31 Pac. Rep. 1057.

81. NEGLIGENCE—Contractor's Liability.—Where the employee of a subcontractor is injured because of the contractor's negligence in prosecuting the portion of the work not sublet, the contractor is liable for the injury.—JOHNSTON v. OTT, Pa., 25 Atl. Rep. 751.

82. NEGLIGENCE — Evidence — Malice. — In an action against a street car company to recover compensatory damages for personal injuries alleged to have been caused by the sudden starting of the car while plaintiff was alighting, evidence as to what occurred when plaintiff got on the car, tending to prove malice on the part of defendant's driver, is not admissible.—GRISIM v. MILWAUKEE CITY RY. CO., Wis., 54 N. W. Rep. 104.

83. NEGLIGENCE—Pleading.—Where a party charges in an action for personal injuries, a specific act of negligence as a ground for damages, he is concluded thereby, and cannot recover upon other grounds of negligence, not alleged. — TELLE v. LEAVENWORTH RAPID TRANSIT RY. CO., Kan., 31 Pac. Rep. 1076.

84. NEGOTIABLE INSTRUMENT.—An action at law may be brought on a promissory note, payable on demand, immediately after its delivery, and before any actual demand has been made.—AGENS v. AGENS, N. J., 25 Atl. Rep. 707.

85. NEGOTIABLE INSTRUMENT — Interest.— Where a promissory note, by its terms, was made payable on or before three years after date, with interest at 8 per cent. per annum after date until paid, the interest does not become due or payable until the maturity of the note.—RAMSDELL v. HULETT, Kan., 31 Pac. Rep. 1092.

86. NOTARY PUBLIC—False Acknowledgment—Damages.—Plaintiff, on representations of J that he was the agent of K, who owned certain land, took a mortgage on the land, purporting to be signed and acknowledged by K, and delivered to J a check for $1,000, payable to K. J presented the check to a bank, and received payment thereon, the check being indorsed by K. The acknowledgment of the deed was false, and the indorsement of K's name on the check was a forgery: Held, in an action by plaintiff to recover the value of the check against the notary who took the false acknowledgment, that plaintiff had no right of action, in that the bank, having paid the check under a forged indorsement, acquired no rights therein against plaintiff, and could not charge the amount paid against plaintiff's account.—HATTON v. HOLMES, Cal., 31 Pac. Rep. 1131.

87. NUISANCE—Noxious Gases.—When a company engaged in burning brick upon leased land uses a process in burning that generates noxious gases, that are wafted upon the adjacent lands of the lessor, injuring and destroying a growing crop of wheat, this is such a nuisance that the lessor may maintain an action to recover damages by reason thereof.—FOGARTY v. JUNCTION CITY PRESS BRICK CO., Kan., 31 Pac. Rep. 1052.

88. PARTITION—Pleading.—A complaint in partition alleged that defendant was the wife of one B, who died intestate, leaving plaintiffs, who are his children by a former marriage; and that before his death one R conveyed the land to B and defendant by a deed which recited that they were to hold the land in common: Held, that the complaint was demurrable, because it did not allege that the parties thereto, at the time the suit was commenced, had any interest in the land.—BROWN v. BROWN, Ind., 32 N. E. Rep. 1128.

89. PARTITION—Res Judicata.—A judgment in partition is conclusive of the rights of the parties in the land sought to be partitioned, and a defendant who failed to assert a claim at the trial will be precluded from afterwards asserting it.—CHRISTY v. SPRING VALLEY WATERWORKS, Cal., 31 Pac. Rep. 1110.

90. PARTNERSHIP.—Under Civil Code, § 2395, a partnership was formed where a contractor, on assigning his contract to others, made a written agreement with them, which agreement provided that the contractor was to do the work, that the parties taking the contract were to furnish the money to carry it on, and receive the payments made as the work progressed, but that the profits were to be equally divided between them.—KENNEDY & SHAW LUMBER CO. v. TAYLOR, Cal., 31 Pac. Rep. 1112.

91. PARTNERSHIP—Contract—Interest.—A contract of partnership construed, and held that the capital of plaintiff's estate was not due and payable on the date of expiration of the term of partnership, but only as the partnership assets were realized after dissolution, and after all the liabilities of the firm were paid, and that during such liquidation of the business such capital did not draw interest.—ST. PAUL TRUST CO. v. FINCH, Minn., 54 N. W. Rep. 190.

92. PLEDGE—Warehouse Receipts.—One who takes, as security for an existing debt and for future advances, negotiable receipts stated to be for goods in free warehouses, but which in fact are still in bond subject to the government tax, is a *bona fide* holder, and is not therefore chargeable with knowledge that the goods are still in bond, or with knowledge of any other equities between the original parties. — FIRST NAT. BANK OF CHICAGO v. DEAN, N. Y., 32 N. E. Rep. 1108.

93. PRACTICE—Continuance.—Code Civil Proc. § 595, which provides that "the court may require the moving party, where application is made on account of the absence of a material witness, to state on affidavit the evidence which he expects to obtain," is not imperative, and should not be required of counsel when he cannot be aided in making the affidavit by his client, who is excusably absent.—LIGHT v. RICHARDSON, Cal., 31 Pac. Rep. 1123.

94. PRINCIPAL AND AGENT—Contract.—A principal, although not having knowledge of all the material facts, may ratify an unauthorized act of an agent in his behalf by voluntarily assuming the risk without inquiry, and upon such knowledge as he possesses, without caring for more. Hence, where a principal, knowing that an unauthorized contract had been made by an agent in his behalf for the use and occupation of certain premises, enters into possession and enjoys their use without knowing or ascertaining what the terms of the lease were, he must be held to have deliberately intended to ratify the contract, whatever it may be.—EHRMANTRAUT v. ROBINSON, Minn., 54 N. W. Rep. 188.

95. PRINCIPAL AND SURETY—Release.—A bank, having a claim against an insolvent corporation, agreed that if another bank, also having a claim, but for a smaller amount, would forego proceedings thereon, it would

pay the claim out of the first money received. The claim of the latter bank was accordingly transferred to the former, which settled with the corporation, but did not offer to pay over the money. The second bank then, without notice or demand, settled directly with the corporation, releasing it from all liability on account of said claim: Held, that such a settlement was a release, also, of the bank.—METROPOLITAN NAT. BANK OF PITTSBURG v. MERCHANTS' & MANUFACTURERS' NAT. BANK OF PITTSBURG, Pa., 25 Atl. Rep. 764.

96. PRINCIPAL AND SURETY—Transfer of Cause of Action.—A bank brought an action in a county court on two promissory notes held by it as collateral security, and recovered judgment thereon against the maker. The defendant took an appeal to the district court, the usual statutory bond being executed. While the cause was pending in the appellate court the indebtedness due the bank by the pledgor of the notes was paid after which one H, to whom the said notes, prior to the bringing of the suit, had also been pledged as collateral security for a debt due him, subject to the claim of the bank, was substituted in place of the bank as plaintiff, who recovered judgment against the maker of the notes: Held, that the surety in the appeal bond or undertaking was not released by the substitution of H as plaintiff.—HOWELL v. ALMA MILLING CO., Neb., 54 N. W. Rep. 126.

97. PROBATE TRIAL— Findings. — Findings of facts will not be set aside because they are intermixed with statements of evidence, argument, and conclusions of law.—IN RE BULLARDS ESTATE, Cal., 31 Pac. Rep. 1119.

98. RAILROAD COMPANIES—Electric Street Railways.—The charter of the city of New Orleans (Laws La. 1882, No. 20, § 8) provides, *inter alia*, that the common council shall have power to authorize the use of the streets for "horse and steam railroads:" Held, that the words "horse and steam railroads" were not words of limitation, and that the council was empowered to grant such franchise to electric railways.—BUCKNER v. HART, U. S. C. C. (La.), 52 Fed. Rep. 835.

99. RAILROAD COMPANIES — Elevated Railways.—An elevated railway company, in acquiring the right to maintain its structure in a street to the injury of the easements of light, air and access of the abutting owner, is liable for the incidental injuries caused by the future discharge of smoke, cinders, and noxious gases occasioned by the running of trains.—SPERB v. METROPOLITAN EL. RY. CO., N. Y., 32 N. E. Rep. 1051.

100. RAILROAD COMPANIES— Taxation. —A township tax levied by the county court to pay bonds issued in aid of a railroad is not a county tax, within the meaning of a railroad company's charter exempting its stock from State and county taxes.—STATE v. HANNIBAL & ST. J. R. CO., Mo., 21 S. W. Rep. 14.

101. REMOVAL OF CAUSES—Application. — A petition for removal to a federal court, although averring that the controversy exceeds the jurisdictional amount, is not "in due form" within Act Cong. March 2, 1867, so as to justify removal, where the original petition shows that the controversy is, in fact, less than said amount. MIDDLETON v. MIDDLETON, Iowa, 54 N. W. Rep. 143.

102. REPLEVIN—Evidence.—In an action of replevin against four parties to recover property, where it appears that two of the parties had previously held a chattel mortgage upon the same, but had transferred it to another before the commencement of the action, and it is not shown that they ever took, held, or claimed possession of the property, nor yet that they were connected with the other two defendants in the taking and holding possession of the property, a judgment against the two former mortgagees for the return of the property cannot be upheld. — REAM v. MCELHONE, Kan., 31 Pac. Rep. 1075.

103. RES JUDICATA.—A final judgment rendered in an action is final and conclusive, between the parties and their privies, upon all matters litigated or necessarily involved in the action in which the judgment was rendered. — SANDFORD v. OBERLIN COLLEGE, Kan., 31 Pac. Rep. 1089.

104. RES JUDICATA — Assignment. — A plea of *res adjudicata* good against a judgment creditor is good against a party to whom the judgment has been assigned, and who seeks to enforce it against the pleader. —PORTER v. BAGBY, Kan., 31 Pac. Rep. 1058.

105. SALE—Rescission — Fraud. — Where goods were sold to be paid for on delivery, either in cash or a secured note payable in 30 days, but the purchaser fraudulently managed to obtain possession of the property without complying with the conditions, the purchaser was insolvent, and mortgaged the property in question to secure pre-existing debts: Held, that the seller upon discovery of the fraud could rescind the sale, and reclaim the goods from the mortgagee.—HENRY v. VLIET, Neb., 54 N. W. Rep. 122.

106. SALE — Warranty.—A parol warranty of the soundness of a stallion, made at the time of its sale, is not affected by a written warranty, never agreed on between the parties, handed by the seller to the purchasers with other papers, without any knowledge on their part, until long afterwards, that any such written warranty had been given.—VALERIUS v. HOCKSPIERE, Iowa, 54 N. W. Rep. 136.

107. SALE—Warranty of Title.—A vendee to whom personal property has been transferred under an executed sale cannot maintain an action upon an implied warranty of title, nor interpose the breach of such implied warranty of title, as a defense to an action for the price, in the absence of fraudulent representations respecting the title, without showing actual damage resulting from such breach of warranty.—HULL v. CALDWELL, S. Dak., 54 N. W. Rep. 100.

108. SPECIFIC PERFORMANCE—Contract.—In an action for specific performance it is not essential that the description in the written contract for the sale of the land should be given with such particularity as to make a resort to extrinsic evidence unnecessary. If the designation is so definite that the purchaser knows exactly what he is buying, and the seller knows what he is selling, and the land is so described that the court can, with the aid of extrinsic evidence, apply the description to the exact property intended to be sold, it is enough.—BACON v. LESLIE, Kan., 31 Pac. Rep. 1066.

109. TAXATION — Illegal Tax—Payment.—A payment to the county treasurer, by an express company, of an illegal tax on its gross receipts from interstate business, under protest, and with notice of an intention to bring action to recover back the amount paid, is an involuntary payment, when made to avoid the penalties imposed by section 2843, Rev. St., and an action may be maintained to recover back the amount so paid. Such payment of the illegal tax under protest, and with notice, becomes involuntary by reason of the danger of destruction to the defaulting company's business through the refusal of others to convey or carry packages, parcels, or merchandise for the company, on account of the statutory penalties for conveying the same.—RATTERMAN v. AMERICAN EXP. CO., Ohio, 32 N. E. Rep. 754.

110. TELEGRAPH COMPANIES — Damages.—Where the contract on a telegraph blank provided that the company, in respect to connecting lines, was the agent of the sender, without liability, and plaintiff asked the company's agent if it had a line and receiving station at O, the point of destination, and was informed that it had, whereupon he delivered the message, and paid for it, relying on the agent's representations, in an action against the company, for failure to deliver the message, defendant is estopped to assert that it did not have a line and office at O.—WESTERN UNION TEL. CO. v. STRATEMEIER, Ind., 32 N. E. Rep. 871.

111. TENDER.—A tender by a debtor to a creditor (who in good faith asserts that the amount tendered is insufficient) is not good as a tender if it be coupled with such conditions that the acceptance of the same will involve an admission by the creditor that no more is due.—MOORE v. NORMAN, Minn., 53 N. W. Rep. 809.

112. TRIAL—Competency of Jurors.—Where a juror, on his *voir dire*, testified that he had no opinion that

would affect his judgment after hearing all the testimony, he is not disqualified, under Hill's Code, § 185, subd. 2, as having an actual bias prejudicial to the substantial rignts of the party challenging, though he had read a newspaper report of a former trial.—STATE v. INGRAM, Oreg., 31 Pac. Rep. 1049.

113. TRIAL—Jury—Right to Waive.—How. St. § 7097, which provides that in criminal prosecutions in justice's court, if no jury is demanded by the accused, the court shall proceed to try the issue, and (section 7099) that, if the accused shall not have waived his right to trial by jury, a jury shall be summoned, gives the accused his choice of two modes of trial; and it is error for the court to order a jury against his protest, after he has demanded a trial by the court without a jury.—PEOPLE v. STEELE, Mich., 54 N. W. Rep. 171.

114. TRIAL—Misconduct of Jurors.—Where there is misconduct of jurors that may have had an influence on the verdict unfavorable to the defeated party, the verdict must be set aside, unless it appear, beyond doubt, that in fact it had no such effect.—WOODBURY v. CITY OF ANOKA, Minn., 54 N. W. Rep. 187.

115. TRIAL — Witnesses. — Where the objection to a witness is addressed to his competency as a witness, and not to the competency of his evidence, his proposed evidence need not be stated. — SULLIVAN v. SULLIVAN, Ind., 32 N. E. Rep. 1132.

116. TRIAL—Witness — Memoranda. — A witness may refresh his recollection by reference to any memoranda, relating to the subject-matter to which his attention is directed on the stand, whether the memoranda is in such form as to be competent as independent evidence or not, and then testify, providing he then has any independent recollection of such subject-matter. — MCNEELY v. DUFF, Kan., 31 Pac. Rep. 1061.

117. TRUST.—A complaint to establish a trust alleged that P paid the purchase price for certain land, and it was agreed between him and his son, without fraudulent intent, that the deed for the land was to be made to the son, who was to hold the land in trust for his father: Held, that the complaint was not demurrable, as the trust sought to be established did not fall within Rev. St. 1881, § 2969, forbidding the creation of an express parol trust in land, but was expressly authorized by section 2976, which provides for a resulting trust in favor of the purchaser of land in such cases. — PROW v. PROW, Ind., 32 N. E. Rep. 1121.

118. TRUST — Dissolution. — A court of equity has no power to compel a testamentary trustee to stipulate for the entry of a judgment declaring the will invalid, and thus annihilating the trusts created by it, when the design of the trusts has not been accomplished, and the trustee refuses to consent to its extinguishment, and there is no insuperable obstacle in the way of its complete performance according to the intent of the testator, though the heirs at law and beneficiaries of the trust have agreed to its dissolution.—CUTHBERT v. CHAUVET, N. Y., 32 N. E. Rep. 1088.

119. TRUST — Evidence. — In an action to enforce a resulting trust in land of which defendants' ancestor died seised, the evidence showed that plaintiff advanced more than half of the consideration paid for the land, and that the decedent many times admitted that plaintiff had a half interest in the land: Held, that the evidence justified a judgment for plaintiff for a half interest in the land.—REESE v. MURNAN, Wash., 31 Pac. Rep. 1027.

120. UNITED STATES SUPREME COURT — Jurisdiction—Appeals from State Courts. — Where the highest court of a State, in determining the effect of a statute of another State, does not question its validity, but merely determines its construction, there is no ground for reviewing the cause in the Supreme Court of the United States, on the theory that the court failed to give such statute the full faith and credit which it was entitled to in the State where it was enacted, and thus denied to the defeated party a right claimed under the constitution or laws of the United States; especially when the construction adopted is not inconsistent with the construction placed upon the statute by the courts of the State in which it was enacted.—GLENN v. GARTH, U. S. S. C., 13 S. C. Rep. 350.

121. USURY — Interest on Interest.—Where a party loans money at the maximum rate allowed by statute, and coupon notes are taken for the interest, which stipulate that interest shall be allowed thereon after maturity at 10 per cent., the contract is not thereby tainted with the vice of usury. In such case no interest will be allowed on such coupons.—ROSE v. MUNFORD, Neb., 54 N. W. Rep. 129.

122. VENDOR AND PURCHASER—False Representations.—Representations of fact made by the owner of property as inducements to its purchase by another, relied upon by the latter as being true, and constituting a substantial inducement to the purchase, become obligatory on the vendor as a contract, even though the vendee may have been also influenced by information derived from other sources.—MARSHALL v. GILMAN, Minn., 53 N. W. Rep. 811.

123. WATERS—Riparian Rights.—A grant of land on a stream which flows from a pond, title to the bed of which is in the State, vests in the grantee a right to the undiminished flow of the water, except by a reasonable use of the water in the pond by the public.—CONCORD MANUF'G CO. v. ROBERTSON, N. H., 25 Atl. Rep. 719.

124. WILLS—Description of Devisees.—A devise to the heirs at law of M, in such shares as they would take if M had inherited the subject-matter of the devise and died intestate, does not include the widow of M.—PLATT v. MICKLE, N. Y., 32 N. E. Rep. 1070.

125. WILLS—Legacies.—The rule that the legatee of a pecuniary legacy, when no time of payment is specified in the will, is entitled to interest after the lapse of one year from the date of testator's death, applies, though the legatee died within such year, though no administrator of his estate was appointed for 18 months after the expiration of such year, and though the legacy was paid as soon as there was any one authorized to receive it, as it is the duty of the executors in such a case to invest the legacy in some interest-bearing fund.—ESMOND v. BROWN, R. I., 25 Atl. Rep. 652.

126. WILLS—Testamentary Capacity.—A finding that a testator was insane at any time prior to the making of the will does not support a presumption that the insanity continued to the making of the will, unless it is also found that the insanity is habitual and fixed.—JOHNSON v. ARMSTRONG, Ala., 12 South. Rep. 72.

127. WITNESS — Transactions with Decedent.—In an action upon a mortuary benefit certificate, brought against a mutual benefit society by a deceased member's wife to whom it was expressly made payable, members of the society, who are subject to assessment to pay mortuary benefits, are not incompetent witnesses, under Act May 23, 1887, § 5, which declares that where any party to a contract is dead, and his right therein has passed to the litigant who represents his interest, no person whose interest is adverse to such decedent shall be a competent witness as to any matter occurring before the death, since the deceased member never had any right to the benefit mentioned in the certificate, and the plaintiff does not represent him.—HAMILL v. SUPREME COUNCIL OF THE ROYAL ARCANUM, Penn., 25 Atl. Rep. 645.

128. WITNESS — Transactions with Decedent. — In a suit against an executor to recover commissions on sums of money collected by the plaintiff for the executor's testator in his life-time, after the establishment by proper proof of an agency to collect money for said testator, it is competent for the plaintiff to testify as to the amount of money collected, and also, in the absence of an express agreement fixing the amount of compensation, as to what is a reasonable compensation for collecting the same. This would not be testifying to a transaction or communication with the deceased, and prohibited by the statute.—LEWIS v. MEGINNISS, Fla., 12 South. Rep. 19.